# Lee Chuie Siang v Public Finance Bhd

HIGH COURT (MELAKA) — CIVIL APPEAL NO 1–12–53 OF 2003
LOW HOP BING J
22 MARCH 2006

*Contract — Consideration — Total failure of — Hire purchase of vehicle — Vehicle could not be registered with Road Transport Department — Impossible for owner to pass good title — Whether amounted to failure of consideration — Whether should return deposit to hirer — Contracts Act 1950 ss 57(2), s 66*

*Contract — Void contract — Impossibility — Hire purchase of vehicle — Vehicle could not be registered with Road Transport Department — Impossible for owner to pass good title — Whether hire purchase agreement void — Whether should return deposit to hirer — Contracts Act 1950 ss 57(2), 66*

*Hire Purchase — Hire purchase agreement — Allegation that the agreement was void — Option to purchase the vehicle — Whether conditional upon hirer fulfilling all the terms and conditions of the agreement*

This was an appeal by the appellant ('the plaintiff') against the decision of the learned sessions court judge ('the trial judge') who had dismissed with costs the plaintiff's claim and allowed with costs the respondent's ('the defendant') counterclaim. The parties had on 1 March 1997 executed a hire purchase agreement ('the agreement'), the plaintiff being the hirer and the defendant the owner in respect of used motorcar bearing registration No JEJ 4935 ('the car'). Pursuant to the agreement, the plaintiff made payments of deposit and monthly instalments amounting to RM73,654.65 as in January 2000. The hire-purchase facility was given by the defendant on the basis of the documents produced. Without any hitch, the plaintiff was able to register the car, pay the road tax and use it for a continuous period of two years, nine months and 12 days until 12 January 2000, when the plaintiff sent the car for inspection at the Melaka Road Transport Department ('the Melaka RTD') in order to apply for a replacement registration card for the car as the original card was allegedly missing. She was informed by the Melaka RTD of some problems with the car, thereby warranting an investigation by the technical control and supervision division ('the division') of the department in Petaling Jaya. Prior to the inspection the car had met with three accidents. Vide letter dated 14 March 2000 the Melaka RTD served on the plaintiff a report dated 2 March 2000 issued by the division pertaining to the result of the investigation. The report confirmed substantial structural changes to the car viz the front portion of the car was found to have been welded and rejoined from two dissected parts, and its chassis number had been tampered with. As a result, pursuant to s 17(1)(b) of the Road

Transport Act 1987, the car could not be registered and consequently the plaintiff could not use it on the road. Hence, she alleged that she had suffered losses. Vide solicitor's letter dated 20 April 2000, the plaintiff terminated the agreement and demanded the refund of RM70,687, in addition to storage charges of RM30 daily commencing 7 May 2000 until the defendant takes repossession of the car. The defendant had declined to accede to the plaintiffs demand. The issues raised in appeal were: (1) whether the plaintiff as owner had been in breach of the condition of the agreement; (2) whether the defendant was in breach of cl 14 of the agreement as the plaintiff was unable to exercise the option to purchase the car which is now non-registrable and non-transferable; (3) whether the non-registration of the car on 12 January 2000 and its consequential unusability constituted a failure of consideration, relying on ss 57(2) and 66 of the Contracts Act 1950; and (4) whether the defendant is not entitled to the counterclaim as the defendant had not given the plaintiff a notice of demand for the sum pleaded in the counterclaim.

**Held**, dismissing the appeal with costs:

(1) It is plain that upon execution of the agreement on 1 March 1997 and subsequently until 12 January 2000, the defendant had a good title to pass and had indeed passed the title to the plaintiff by having the car registered in the name of the plaintiff who during this entire period had been using the car without any legal impediment whatsoever. The defendant could not be attributed with any responsibility for the plaintiff's subsequent conduct and actions consequent upon the third accident which brought about the aforesaid structural changes to the car. Had the car not met with the third accident, its original merchantable quality would not have been an issue and so there could have been no doubt that the defendant would have been able to pass a good title to the plaintiff (see para 19).

(2) As hirer, the plaintiff's obligation to keep the car in good repair and condition and to notify the defendant as owner in the event of the car suffering any damage, had been expressly stated in the agreement. The plaintiff was also prohibited from, eg altering the identifying number or mark on the car, under the agreement. There was no evidence adduced at the trial in the court below to prove that the plaintiff had ever fulfilled any of the express conditions stated above. The failure on the part of the plaintiff in this regard clearly constituted the plaintiff's breach thereof (see paras 21–23).

(3) Had the plaintiff fulfilled these contractual conditions, the title to and hence the merchantable quality of the car would have continued to remain intact and inviolable (see para 24).

(4) Upon a plain reading of cl 14 of the agreement, it is abundantly clear that the plaintiff's exercise of the option to purchase the car is upon the plaintiff's fulfilment of the condition precedent, ie if the plaintiff had duly performed all the stipulations and conditions in the agreement on her part to be performed and observed. As stated earlier in the preceding issue, the plaintiff had been in breach of cl 6.1.1 and cl 6.1.6 of the agreement and so was precluded from invoking cl 14 (see paras 28–29).

(5) The plaintiff had been in possession and using the car for almost three years during which she had effected payments for the relevant instalments, until its unusability was brought about by the third accident which resulted in the above structural changes to the car. Hence, as in *Yeoman Credit Ltd v Apps* [1962] 2 QB 508, the court was of the view that the plaintiff was unable to rely on the doctrine of failure of consideration (see para 37).

(6) A proper perusal of the appeal record reveals that upon the plaintiffs default in paying the arrears of instalments under the agreement, the defendant has served the requisite notice on the plaintiff on 8 March 2000. This was followed by the defendant's reminder notice dated 16 March 2000 served by registered post on the plaintiff (see para 40).

**[Bahasa Malaysia summary**

Ini adalah rayuan oleh perayu ('the plaintif') terhadap keputusan hakim mahkamah sesyen yang bijaksana ('hakim perbicaraan') yang telah menolak dengan kos tuntutan plaintif dan membenarkan dengan kos tuntutan balas responden ('defendan'). Pihak-pihak pada 1 Mac 1997 telah menyempurnakan satu perjanjian sewa beli ('perjanjian tersebut'), plaintif sebagai penyewa dan defendan sebagai tuanpunya kereta terpakai dengan nombor pendaftaran No JEJ 4935 ('kereta tersebut'). Menurut perjanjian, plaintif telah membuat bayaran deposit dan ansuran bulanan sejumlah RM73,654.65 setakat Januari 2000. Kemudahan sewa beli diberikan oleh defendan adalah berdasarkan dokumen-dokumen yang dikemukakan. Tanpa apa-apa masalah, plaintif dapat mendaftar kereta itu, membayar cukai jalan dan menggunakannya untuk tempoh berterusan selama dua tahun, sembilan bulan dan 12 hari sehingga 12 Januari 2000, apabila plaintif menghantar kereta itu untuk pemeriksaan di Jabatan Pengangkutan Jalan Raya Melaka ('JPJR Melaka') bagi tujuan memohon ganti kad pendaftaran untuk kereta itu kerana kad asal dikatakan hilang. Beliau dimaklumkan oleh JPJR Melaka tentang beberapa masalah dengan kereta itu, yang mewajarkan satu pemeriksaan oleh bahagian kawalan teknikal dan pengawasan ('bahagian tersebut') di jabatan di Petaling Jaya. Sebelum pemeriksaan itu, kereta tersebut telah mengalami tiga kemalangan. Melalui surat bertarikh 14 Mac 2000, JPJR Melaka telah menyampaikan plaintif satu laporan bertarikh 2 Mac 2000 yang dikeluarkan oleh bahagian tersebut berkaitan hasil pemeriksaan itu. Laporan mengesahkan pertukaran struktur yang besar ke atas kereta itu, iaitu di bahagian depan kereta yang didapati telah dikimpal dan disambung semula daripada dua bahagian yang potong, dan nombor casisnya telah diubah. Oleh sebab itu, menurut s 17(1)(b) Akta Jalan Raya 1987, kereta tersebut tidak boleh didaftarkan dan berikutan itu plaintif tidak dapat menggunakannya di atas jalan raya. Justeru itu, beliau mengatakan bahawa beliau telah mengalami kerugian. Melalui surat peguam bertarikh 20 April 2000, plaintif telah menamatkan perjanjian itu dan menuntut bayaran balik sejumlah RM70,687, berserta caj penyimpanan RM30 setiap hari bermula 7 Mei 2000 sehingga defendan mengambil balik milikan kereta itu. Defendan tidak bersetuju dengan tuntutan plaintif. Persoalan yang ditimbulkan dalam rayuan ini adalah: (1) sama ada plaintif sebagai pemilik telah melanggar syarat perjanjian; (2) sama ada defendan telah melanggar kl 14 perjanjian kerana plaintif tidak dapat melaksanakan pilihan untuk membeli kereta itu yang sekarang tidak berdaftar dan tidak boleh dipindahhak; (3) sama ada kereta yang tidak boleh didaftar

pada 12 Januari 2000 dan yang penting tidak boleh digunakan membentuk kegagalan suatu balasan, bergantung kepada ss 57(2) dan 66 Akta Kontrak 1950; dan (4) sama ada defendan tidak berhak kepada tuntutan balas itu kerana defendan tidak memberikan plaintif notis tuntutan untuk jumlah yang diplidkan dalam tuntutan balas.

**Diputuskan**, menolak rayuan tersebut dengan kos:

(1) Adalah jelas bahawa setelah penyempurnaan perjanjian itu pada 1 Mac 1997 dan berikutnya sehingga 12 Januari 2000, defendan mempunyai hak milik baik untuk memindah dan telahpun memindahkan hak milik kepada plaintif dengan mendaftarkan kereta tersebut dalam nama plaintif yang dalam sepanjang tempoh itu telah menggunakan kereta itu tanpa apa-apa sekatan dari segi undang-undang. Defendan tidak mungkin telah menyumbang dengan apa-apa tanggungjawab untuk perbuatan dan tindakan plaintif seterusnya selepas kemalangan ketiga yang menyebabkan perubahan struktur kereta tersebut. Sekiranya kereta tersebut tidak mengalami kemalangan ketiga itu, kualiti boleh niaga asalnya tidak akan menjadi isu dan tidak diragui yang defendan akan dapat memindahkan hak milik baik kepada plaintif (lihat perenggan 19).

(2) Sebagai penyewa, tanggungjawab plaintif untuk menjaga kereta dalam keadaan baik dan memaklumkan defendan sebagai pemilik sekiranya kereta itu mengalami apa-apa kerosakan, telahpun dinyatakan dengan jelas dalam perjanjian tersebut. Plaintif juga dihalang daripada, contohnya mengubah nombor pengenalan atau tanda kereta, di bawah perjanjian tersebut. Tiada keterangan dikemukakan semasa perbicaraan di mahkamah untuk membuktikan bahawa plaintif telahpun memenuhi mana-mana syarat nyata yang tersebut di atas. Kegagalan di pihak plaintif jelas membentuk perlanggaran plaintif (lihat perenggan 21–23).

(3) Sekiranya plaintif telah memenuhi syarat-syarat kontraktual berikut, hak milik dan kualiti boleh niaga kereta tersebut akan terus kekal tidak terjejas dan tidak tercemar (lihat perenggan 24).

(4) Setelah membaca kl 14 perjanjian, adalah jelas bahawa penggunaan plaintif akan pilihan untuk membeli kereta tersebut terletak pada pematuhan pra syarat plaintif, iaitu jika plaintif telah melaksanakan semua ketetapan dan syarat dalam perjanjian tersebut di pihaknya untuk dilaksanakan dan diteliti. Seperti yang dinyatakan sebelum ini berhubung isu tersebut, plaintif telah melanggar kl 6.1.1 dan kl 6.1.6 perjanjian tersebut dan dihalang daripada menggunakan kl 14 (lihat perenggan 28–29).

(5) Plaintif mempunyai milikan dan menggunakan kereta tersebut untuk hampir tiga tahun dan beliau telah membuat bayaran untuk ansuran berkaitan, sehingga ia tidak boleh digunakan lagi akibat kemalangan ketiga yang telah menyebabkan perubahan struktur kereta seperti yang telah dinyatakan di atas. Justeru itu, seperti dalam *Yeoman Credit Ltd v Apps* [1962] 2 QB 508, mahkamah berpendapat bahawa plaintif tidak boleh bergantung kepada doktrin kegagalan balasan (lihat perenggan 37).

(6) Penelitian rekod rayuan menunjukkan bahawa kegagalan plaintif membayar tunggakan ansuran di bawah perjanjian, defendan telah menyampaikan notis yang diperlukan ke atas plaintif pada 8 Mac 2000. Ini diikuti oleh notis peringatan defendan bertarikh 16 Mac 2000 yang telah disampaikan melalui pos berdaftar ke atas plaintif (lihat perenggan 40).]

**Notes**

For a case on impossibility, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) para 4889.
For cases on allegation that the agreement was void, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3634–3635.
For cases on total failure of consideration, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2709–2715.

**Cases referred to**

*Karflex, Limited v Poole* [1993] 2 KB 251 (refd)
*Public Finance Bhd v Ehwan bin Saring* [1996] 1 MLJ 331 (refd)
*Yeoman Credit Ltd v Apps* [1962] 2 QB 508 (refd)
*United Manufacturers Sdn Bhd v Sulaiman bin Ahmad & Anor* [1989] 1 MLJ 482 (refd)

**Legislation referred to**

Contracts Act 1950 ss 57(2), 66
Hire Purchase Act 1967 ss 7(4), 43(c), 44
Hire Purchase (Recovery of Possession and Maintenance of Records by Owners) Regulations 1976 r 3(2)
Road Transport Act 1987 s 17(1)(b)

**Appeal from**: Suit No 52–727 of 2000 (Sessions Court, Melaka)

*Ikram Muzakhir Cheah (Soo Thien Ming & Nashrah) for the appellant/plaintiff.*
*Ravinathan Muthiah (Ravi Muthiah & Co) for the respondent/defendant.*

**Low Hop Bing J:**

APPEAL

**[1]** This is the appeal by the appellant-plaintiff ('the plaintiff') against the decision of the learned sessions court judge ('the trial judge') who had on 6 November 2003 dismissed with costs the plaintiff's claim and allowed with costs the respondent-defendant's ('the defendant's') counterclaim.

FINDING OF FACTS

**[2]** After a full hearing, the trial judge arrived at the following finding of facts.

**[3]** The parties have on 1 March 1997 executed a hire-purchase agreement ('the agreement'), the plaintiff being the hirer and the defendant the owner.

The goods was a Honda Civic 1.6 used motorcar bearing registration No JEJ 4935, engine No D15B2044430 and chassis No. EG81019142 ('the car'). A

**[4]** Pursuant to the agreement, the plaintiff made payments of deposit and monthly instalments amounting to RM73,654.65 as in January 2000.

**[5]** The car was sourced by the plaintiffs younger brother (SP5) from a friend, one Ah Jien, in a shop whose name SP5 cannot remember now. When SP5 bought the car in early 1997, he did not ascertain the conditions, background or the original owner of the car. The hire-purchase facility was given by the defendant on the basis of the documents produced by the said Ah Jien. Without any hitch, the plaintiff was able to register the car, pay the road tax and use it for a continuous period of two years, nine months and 12 days until 12 January 2000, when it was actually discovered that the car had sustained serious damage in the third accident, whereby the engine, bumper and bonnet had to be replaced. B C

**[6]** However, on or about 12 January 2000 when the plaintiff sent the car for inspection at the Melaka Road Transport Department ('the Melaka RTD') in order to apply for a replacement registration card for the car as the original card was allegedly missing, she was informed by the Melaka RTD of some problems with the car, thereby warranting an investigation by the technical control and supervision division ('the division') of the department in Petaling Jaya. D

**[7]** Vide letter dated 14 March 2000 the Melaka RTD served on the plaintiff a report dated 2 March 2000 issued by the division pertaining to the result of the investigation. E

**[8]** The report confirmed substantial structural changes to the car viz. the front portion of the car was found to have been welded and rejoined from two dissected parts, and its chassis number has been tampered with. As a result, pursuant to s 17(1)(b) of the Road Transport Act 1987, the car could not be registered and consequently the plaintiff could not use it on the road. Hence, she alleged that she has suffered losses. F

**[9]** The plaintiff's evidence confirmed that there were substantial structural changes to the car which had been in the workshop for five months for the purpose. G

**[10]** On 27 March 2000, the plaintiff lodged Batu Berendam police report No 1016/2000 and informed the defendant's assistant manager of the same.

**[11]** Vide solicitor's letter dated 20 April 2000, the plaintiff terminated the agreement and demanded the refund of RM70,687 (when the actual sum was RM73,654.65 as pleaded in the statement of claim), in addition to storage charges of RM30 daily commencing 7 May 2000 until the defendant takes repossession of the car. The defendant has declined to accede to the plaintiffs demand. H

MERCHANTABLE QUALITY I

**[12]** It was submitted by Mr Ravinathan Muthiah, defendant's learned counsel, that as the car could not be registered until today, it was not of merchantable quality as the defendant was unable to give a valid title to the plaintiff.

**[13]** Learned counsel Mr Ikrarn Muzakhir Cheah responded for the plaintiff that on the date of the execution of the agreement, the defendant was able to give a valid title to the plaintiff as it was registered in her name on 28 February 1997 and that the plaintiff had been using the car until the third accident, in which case cl 6.1.1 and 6.1.6 of the agreement would apply.

**[14]** A reference hereinafter to a clause is a reference to that clause in the agreement while a reference to a section is a reference to that section in the Hire-Purchase Act 1967 unless the context otherwise requires.

**[15]** In my judgment, the opposing submissions may be resolved by considering the nature and content of the agreement which must be construed in the light of the applicable case law and the Hire-Purchase Act 1967.

**[16]** In *Karflex Limited v Poole* [1993] 2 KB 251, Lord Goddard J. held that in a hire-purchase agreement, the plaintiff as the owner of the car was under an express condition to pass the property therein to the hirer at any moment after the execution of the agreement when the hirer chose to pay the full purchase price, whether by means of instalments or by a lump sum, and that where the car bought from a third party was found to be stolen and no title could pass as the third party had obtained possession dishonestly, the owner in the hire-purchase agreement was found to be in breach of the condition.

*Karflex* was applied by Mohd Ghazali J (now JCA) in *Public Finance Bhd v Ehwan bin Saring* [1996] 1 MLJ 331 at pp 346–347B, where his Lordship held that s 7(4) of the Hire Purchase Act 1967 has preserved the common law position that the owner must have a good title to pass when he entered into a hire-purchase agreement. Hence, where after six weeks the hire-purchase agreement was executed, the car was seized by the Customs and Excise Department for an alleged offence, and had riot been returned to either party, thereby making it impossible for the owner to pass a good title to the hirer, the owner was held to have occasioned a breach of a condition of the agreement.

**[17]** It is appropriate for me to observe that the facts in the above two authorities concern the non-transferability of the car, in the first case due to theft, and in the second case the alleged commission of an offence, which had respectively resulted in the breach of condition by the owner. Having regard to the plaintiffs submission along the line of these two authorities, I am of the view that the issue raised for immediate consideration at this stage is: 'Whether on the facts the plaintiff as hirer has been in breach of the condition?'.

**[18]** On the facts, it is plain that upon execution of the agreement on 1 March 1997 and subsequently until 12 January 2000, the defendant had a good title to pass and has indeed passed the title to the plaintiff by having the car registered in the name of the plaintiff who during this entire period had been using the car without any legal impediment whatsoever. In my view, the defendant could not be attributed with any responsibility for the plaintiffs subsequent conduct and actions consequent upon the third accident which brought about the aforesaid structural changes to the car. Indeed, had the car not met with the third accident, its original merchantable

quality would not have been an issue and so there could have been no doubt that the defendant would have been able to pass a good title to the plaintiff. A

**[19]** In the circumstances, unlike *Karplex* and *Ehwan bin Saring*, I am unable to find any breach of the express condition pertaining to the defendant's ability to pass a good title to the plaintiff. B

**[20]** Further as hirer, the plaintiffs obligation to keep the car in good repair and condition and to notify the defendant as owner in the event of the car suffering any damage, has been expressly stated in cl 6.1.1 in the following terms:

> 6.1 The Hirer shall for the duration of this agreement: C
>
> 6.1.1 at his own cost and expenses keep the Goods in good repair and condition to the satisfaction of the owner… In the event of the Goods suffering any damage the Hirer shall forthwith and before incurring any expense in connection with the repair thereof *notify the owner*…
>
> (Emphasis added.) D

**[21]** The plaintiff is also prohibited from, eg altering the identifying number or mark on the car, under cl 6.1.6 which reads as follows:

> 6.1 The Hirer shall for the duration of this agreement: E
>
> 6.1.6 keep the Goods in his possession and not conceal the Goods or *to alter them or any identifying number or mark thereon.*
>
> (Emphasis added.)

**[22]** There was no evidence adduced at the trial in the court below to prove that the plaintiff has ever fulfilled any of the express conditions contained in the aforesaid two clauses. The failure on the part of the plaintiff in this regard clearly constitutes the plaintiff's breach thereof. F

**[23]** Had the plaintiff fulfilled these contractual conditions, the title to and hence the merchantable quality of the car would have continued to remain intact and inviolable. G

OPTION TO PURCHASE

H

**[24]** It was asserted for the plaintiff that the defendant was in breach of cl 14 of the agreement as the plaintiff was unable to exercise the option to purchase the car which is now non-registrable and non-transferable.

**[25]** The defendant took the position that it was the plaintiff who was in breach of the agreement. I

**[26]** In my judgment, the answer to the above conflicting submissions has been given in the preceding issue entitled 'merchantable quality'. In addition, I would make reference to cl 14 which, where relevant, reads:

XIV. OPTION TO PURCHASE

14…. if the Hirer shall duly perform and observe all the stipulations and conditions in this Agreement on his part to be performed and observed the Hirer shall have an option of purchasing the Goods and upon exercising such option of purchasing the Goods…

**[27]** Upon a plain reading of cl 14, it is abundantly clear that the plaintiffs exercise of the option to purchase the car is upon the plaintiffs fulfilment of the condition precedent, ie if the plaintiff has duly performed all the stipulations and conditions in the agreement on her part to be performed and observed.

**[28]** As stated earlier in the preceding issue, the plaintiff has been in breach of cl 6.1.1 and cl 6.1.6 and so is precluded from invoking cl 14.

FAILURE OF CONSIDERATION

**[29]** It was stressed for the plaintiff that the non-registration of the car on 12 January 2000 and its consequential unusability constituted a failure of consideration, relying on ss 57(2) and 66 of the Contracts Act 1950.

**[30]** The defendant contended to the contrary.

**[31]** In my judgment, it is instructive to observe that ss 57(2) and 66 of the Contracts Act 1950 clearly relate to matters other than the doctrine of failure of consideration.

**[32]** For the avoidance of doubt, s 57(2) of the Contracts Act 1950 is intended to render a contract void, when a contract to do an act subsequently becomes impossible or unlawful. It reads:

57. Agreement to do Impossible act.

(1)…

*Contract to do act afterwards becoming impossible or unlawful.*

(2) A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

**[33]** Section 66 of the same Act provides for the obligation of a person who has received an advantage under a void agreement to make restitution, as follows:

66. Obligation of person who has received advantage under void agreement, or contract that becomes void.

When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

**[34]** The above two sections obviously come within the domain of the doctrine of frustration in the law of contract and the consequences that flow therefrom.

**[35]** In relation to the failure of consideration in a hire-purchase agreement, I am not unmindful of the English Court of Appeal judgment in *Yeoman Credit Ltd v Apps* [1962] 2 QB 508, CA. There, by a hire-purchase agreement, the hire-purchase company hired a car to the hirer, at an initial payment to be followed by 30 monthly instalments. The defendant effected the initial payment. The car was in an unusuable condition and required expenditure to put it to a reasonable condition. The hirer complained to the hire-purchase company about the car's condition, but kept the car and paid only three subsequent instalments. The company determined the hiring, removed the car from the hirer's house and brought proceedings against the hirer for arrears of instalments and damages. The hirer counterclaimed for £170 paid under the agreement, alleging failure of consideration. The county court judge found for the hirer. On appeal, Holroyd Pearce LJ disagreed and held that the hirer's use coupled with possession and continuance of the hire-purchase agreement debarred the hirer from saying that there was a total failure of consideration.

**[36]** The facts in the instant appeal bear a striking similarity in that the plaintiff has been in possession and using the car for almost three years during which she has effected payments for the relevant instalments, until its unusability was brought about by the third accident which resulted in the above structural changes to the car. Hence, as in *Yeoman Credit*, I am of the view that the plaintiff is unable to rely on the doctrine of failure of consideration.

DEFENDANT'S COUNTERCLAIM

**[37]** The plaintiff contended that the defendant is not entitled to the counterclaim as the defendant has not given the plaintiff a notice of demand for the sum pleaded in the counterclaim.

**[38]** It was argued for the defendant that, *inter alia,* the plaintiff had to pay the sum stated in the defendant's counterclaim, as the notice dated 1 March 2000 under the Fourth Schedule to the Hire Purchase Act 1967 ('the notice') had been sent to the plaintiff on 8 March 2000 by registered post.

**[39]** In my judgment, a proper perusal of the appeal record reveals that upon the plaintiff's default in paying the arrears of instalments under the agreement, the defendant has served the requisite notice on the plaintiff on 8 March 2000. This was followed by the defendant's reminder notice dated 16 March 2000 served by registered post on the plaintiff. These notices were sent to the plaintiffs address at 19, Jalan Sri Tanjung 6, Taman Sri Tanjung, 76400 Tanjung Kling Melaka, which address the plaintiff has given to the defendant and was incorporated into the agreement.

**[40]** Clause 18 provides for the service of, eg a notice by one party to the other party in the manner prescribed by the Act.

**[41]** Section 43(c) provides for such a notice to be served, given or sent by posting, it by registered post addressed to the hirer at his last known place of abode or business.

**[42]** As the above notices had been sent to the plaintiff in the manner prescribed in s 43(c), they constitute prima facie proof, under s 44 which the plaintiff has not rebutted.

**[43]** In *United Manufacturers Sdn Bhd v Sulaiman bin Ahmad & Anor* [1989] 1 MLJ 482 where a hirer has, inter alia, fallen into arrears of hire rentals under a hire-purchase agreement, and has failed to comply with the Fourth Schedule notice served on him by the owner in accordance with s 43(c), as in the instant appeal, Gunn Chit Tuan J (later CJ (Malaya)) had no hesitation in entering summary judgment for the owner.

CONCLUSION

**[44]** It needs to be observed that the plight or predicament of the plaintiff could have been avoided if she had properly perused the agreement and fulfilled her contractual obligations. On the foregoing grounds, I hold that the decision of the trial judge is free from error and is hereby affirmed, with the result that this appeal is dismissed with costs.

*Appeal dismissed with costs.*

Reported by K Krishnan